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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 REGENCE BLUESHIELD, *et al.*,

10 Plaintiffs,

11 v.

12 BNY MELLON BANK, N.A.,

13 Defendant.

Case No. C09-0618RSL

ORDER GRANTING  
MOTION TO AMEND

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15 **I. INTRODUCTION**

16 This matter comes before the Court on plaintiffs' motion to file a second amended  
17 complaint. Now that the Court has dismissed plaintiffs' claim for injunctive relief,  
18 plaintiffs seek to amend their complaint to add a claim for damages and a claim under the  
19 Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*  
20 Defendant BNY Mellon Bank, N.A. ("Mellon" or "defendant") contends that the Court  
21 should deny the motion because plaintiffs delayed asserting a damages claim for purely  
22 tactical reasons, and because an amendment would result in prejudice.  
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1 For the reasons set forth below, the Court grants the motion to amend.<sup>1</sup>

## 2 II. DISCUSSION

3 The background facts in this case are set forth in prior orders and will not be  
4 repeated here. Most recently, by order dated October 27, 2009, the Court granted  
5 defendant's motion to dismiss plaintiffs' claim for injunctive relief. (Dkt. #39). In their  
6 opposition to that motion, plaintiffs vaguely contended that if injunctive relief were  
7 denied, "then damages are clearly supported as an alternative remedy." Plaintiffs'  
8 Opposition to Motion to Dismiss at p. 14. The Court noted that the amended complaint  
9 was devoid of any claim for damages, and plaintiffs had not moved to amend their  
10 complaint to seek that relief. After the dismissal, plaintiffs moved to amend, and the  
11 issue is now ready for the Court's review. This order focuses on the proposed addition of  
12 a damages claim because defendant does not separately object to the addition of an  
13 ERISA claim.

14 As an initial matter, defendant contends that this Court's discretion to deny the  
15 proposed amendment is "'particularly broad' where, as here, the plaintiff has already  
16 amended its complaint." Opposition at p. 4. In the cases on which defendant relies,  
17 however, the courts had previously granted plaintiff leave to amend. Chodos v. W.  
18 Publ'g Co., 292 F.3d 992, 1003 (9th Cir. 2002) (explaining that the discretion to deny a  
19 motion to amend is particularly broad where "a district court has already granted a  
20 plaintiff leave to amend"). In this case, however, plaintiffs previous amendment was as a  
21 matter of right. The applicable standard is, "The court should freely give leave when  
22 justice so requires." Fed. R. Civ. P. 15(a)(2). The Court considers four factors in

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24 <sup>1</sup> Because the Court finds that this matter can be decided on the parties'  
25 memoranda, declarations, and exhibits, plaintiffs' request for oral argument is denied.

1 deciding whether to grant leave to amend: “bad faith, undue delay, prejudice to the  
2 opposing party, and the futility of amendment.” Kaplan v. Rose, 49 F.3d 1363, 1370 (9th  
3 Cir. 1994).

4 Defendant contends that plaintiffs should not be permitted to add a claim for  
5 damages that they have previously withheld for tactical reasons. Plaintiffs counter that  
6 they did not request damages in the original or amended complaint “because Regence is  
7 entitled to injunctive relief, which is the only remedy that will make Regence whole.”  
8 Plaintiffs’ Opposition to Motion to Dismiss at p. 14. Even if an injunction was plaintiffs’  
9 preferred remedy, they could have asserted an alternate damages theory in their complaint  
10 or amended complaint. See, e.g., Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508  
11 (1959) (“Under the Federal Rules the same court may try both legal and equitable causes  
12 in the same action.”). Plaintiffs have not learned any new facts that would justify the  
13 delay in asserting a damages claim. In fact, months before plaintiffs filed this motion to  
14 amend, they acknowledged the availability of damages by (1) filing a demand for a jury  
15 trial, which is only available in cases seeking damages, and (2) stating in their initial  
16 disclosures that “Plaintiffs calculate that their damages under the contracts at issue are  
17 approximately \$8.3M USD, plus any amounts proven at the time of hearing or trial.”  
18 Declaration of Lisa Manheim, (Dkt. #35), Ex. A. Because plaintiffs were aware of the  
19 damages theory and could have pleaded it earlier in the alternative, it appears that the  
20 only explanation for their failure to do so was the belief that withholding the claim  
21 strengthened their argument that only an injunction would afford adequate relief. The  
22 Ninth Circuit has explained that “late amendments to assert new theories are not reviewed  
23 favorably when the facts and the theory have been known to the party seeking amendment  
24 since the inception of the cause of action.” Acri v. Int’l Assoc. of Machinists &

1 Aerospace Workers, 781 F.2d 1393, 1398 (9th Cir. 1986). The Court is reluctant to grant  
2 a request to amend when, for tactical reasons, plaintiffs chose to pursue a damages theory  
3 only after the Court rejected their more favorable injunction theory. See, e.g., In re  
4 Beverly Hills Bancorp, 752 F.2d 1334, 1338 (9th Cir. 1984) (citing Dussouy v. Gulf  
5 Coast Inv. Corp., 660 F.2d 594, 599 (5th Cir. 1981) (finding that amendment was not  
6 appropriate where plaintiff was aware of facts and asserted seriatim claims for tactical  
7 reasons)).

8 Although plaintiffs' tactical maneuvering weighs heavily against permitting the  
9 amendment, the Court notes that leave should be "freely given." Fed. R. Civ. P. 15(a).  
10 Moreover, plaintiffs did not move to amend simply to avoid a pending adjudication on the  
11 merits. Nor has defendant raised a futility argument. Rather, defendant contends that it  
12 will suffer prejudice if plaintiffs are permitted to amend the complaint. Its claim of  
13 prejudice is based on three assertions: (1) during the six months that this action has been  
14 pending, "both BNY Mellon and the Court have expended significant resources dealing  
15 with Regence's request for injunctive relief," (Opposition at p. 6); (2) "BNY Mellon has  
16 formulated its litigation strategy in this matter based on defeating a claim for injunctive  
17 relief," (id. at p. 7); and (3) had it known that plaintiffs would assert a damages claim, it  
18 would have sought formal or informal consolidation of its discovery efforts with a case  
19 pending against it in the Eastern District of Oklahoma.<sup>2</sup> Although defendant has focused  
20 its defense on defeating an injunction, the Court and the parties would have had to resolve  
21 plaintiffs' request for injunctive relief regardless of whether they also sought damages, so  
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24 <sup>2</sup> Although the Oklahoma case is styled as a class action, it appears to involve a  
25 different investment vehicle than the one at issue in this case. CompSource Okla. v. BNY  
Mellon, N.A., Case No. 08-469 (E.D. Okla. 2008).

1 that contention does not support a finding of prejudice. As for the second issue,  
2 defendant has ample time to adjust its litigation strategy: when plaintiffs moved to amend,  
3 the case had been pending for only six months and the parties have not yet conducted  
4 discovery or filed motions directed to the merits of the case. Cf. Sandcrest Outpatient  
5 Services, P.A. v. Cumberland County Hosp. Sys., Inc., 853 F.2d 1139, 1149 (4th Cir.  
6 1988) (denying leave to amend where defendant’s “various discovery motions and the  
7 joint motion for summary judgment were prepared within the context of a damage suit  
8 only;” the amendment was denied on the grounds of undue delay and futility). Moreover,  
9 because of plaintiffs’ prior suggestions of a damages issue, defendant was not wholly  
10 surprised by the belated motion to amend. Because no discovery has occurred in this  
11 case, defendant may still seek “discovery consolidation, formal or informal, with the  
12 *CompSource* action.” Defendant’s Opposition at p. 8.

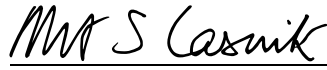
13 In sum, although the Court finds that plaintiffs unduly delayed pursuing a claim for  
14 damages, it will grant leave to amend because of the early stage of this case and the  
15 absence of evidence of futility or prejudice. However, plaintiffs are cautioned that any  
16 additional strategic behavior will not be well received and may result in the imposition of  
17 sanctions.

### 18 III. CONCLUSION

19 For all of the foregoing reasons, the Court GRANTS plaintiffs’ motion to amend  
20 the complaint (Dkt. #40). Plaintiffs must file their second amended complaint in the  
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1 docket within twenty days of the date of this order.

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3 DATED this 5th day of January, 2010.

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6 Robert S. Lasnik  
7 United States District Judge  
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